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ABSTRACT

The acquired immune deficiency syndrome (AIDS) is an incurable, fatal disease that is caused by a virus that eventually destroys the body's immune system. While AIDS is contagious, the risk of contracting AIDS through casual contact is said to be negligible. A review of the court cases involving students with AIDS reveals that the precedent has been set--children with AIDS are being allowed to attend school. The national Center for Disease Control has recommended, and the courts have supported, that schools should establish a multidisciplinary team to study, on a case-by-case basis, the placement of students with AIDS. Placement decisions should be made by a team of persons who are knowledgeable about the child, and should be based on medical and educational data. The courts have recommended that the child's physician and public health personnel be included on this team. The school may place limitations on the activities in which a child with AIDS may participate and may also take steps to ensure that information about students with AIDS is kept confidential. All school districts must adopt routine procedures for the handling of blood or body fluids, bites, or bleeding injuries, regardless of whether students with AIDS are known to be in attendance. It is paramount that districts develop educational programs about AIDS that are effective so that students learn the facts. (MLF)

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AIDS: Education's New Dilemma

By D. Kay Freeland and Charles F. Faber

AIDS is an acronym for Acquired Immune Deficiency Syndrome. AIDS is an incurable, fatal disease that is caused by a virus which eventually destroys the body's immune system. The virus known as HTLV-III, which so weakens the immune system, has been detected in four bodily fluids: blood, semen, saliva, and tears.[1]

What about the education of children with AIDS? Should a child with AIDS be allowed to attend public school? Parents, schools, and the courts have already faced a number of dilemmas posed by students with AIDS. "The legal dilemmas are exacerbated because decisions must be made in the absence of adequate medical knowledge about the cause...or treatment of the disease. Moreover, judicial and legislative decisions are being made in a context in which fears about the disease...are powerful."[2]

While the exact origin of AIDS is unknown, it was first noted in the United States in the late 1970's and early 1980's. By 1981, only 266 cases of AIDS had been identified in the United States, but by September, 1987, the number of cases diagnosed had reached 41,825. Of the 41,825 diagnosed cases only 17,775 of the victims were still alive. Every state has at least one reported AIDS case, but at the present time most of the cases are concentrated in six major metropolitan areas: New York; San Francisco; Los Angeles; Houston; Washington, D.C.; and Miami.[3]

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AIDS represents only the end-stage of the disease. Researchers have recently divided the infection into six progressive stages based on the level of damage to the immune system. The progression ranges from Stage 1, where the person is infected but the immune system still seems normal, to Stage 6, where the body's defenses have collapsed and any infection - even a cold - becomes life threatening.[4] The United States Center for Disease Control has estimated that the number of people who are infected with the AIDS virus is about 1.5 million.

Medical experts say that children with AIDS fall into three groups: those who become infected from contaminated blood supplies; those who were born with the disease (having contracted it either in the womb or during birth); and teenagers who have taken drugs with dirty hypodermic needles or have had sexual intercourse with an AIDS carrier.[5]

There is a second group of individuals who carry the related HTLV-III/LAV virus. Members of this group, classified as having AIDS Related Complex or ARC, have not yet developed symptoms. Medical researchers believe that "there are decidedly more children with ARC than there are children with AIDS...Consequently, the magnitude of AIDS in the public schools, capable of transmission yet still undetected, is unknown at the present time."[6]

The rights of children infected with AIDS to attend school are a matter of intense controversy. What is the balance between societal and individual rights? "Those who are well have a right to live reasonably free from fear and contamination from this disease. They should not be compelled to take unnecessary risks, especially with their children. On the other hand if suspicion and fear get the better of us, it could tear our society apart."[7]

In deciding how to deal with the children with AIDS, one should first examine what the courts have done in the past in addressing children with communicable diseases.

The regulation of public health is part of the police power reserved to the states through the Tenth Amendment. This power allows the states to protect its citizens from epidemic diseases. In 1905, the Supreme Court of the United States held that a board of health requirement that all persons in Cambridge, Massachusetts, be vaccinated did not violate personal liberties secured under the Fourteenth Amendment. In this case, the Court noted that "the liberty secured by the Constitution of the United States to every person within its jurisdiction does not impart an absolute right on each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good."[8] Among such restraints are reasonable regulations established to protect the public health and safety.

States have used their police powers to prevent the spread of smallpox, yellow fever, tuberculosis and leprosy. AIDS, however, presents a more difficult situation. While AIDS is contagious, the risk of contracting AIDS through casual contact is said to be neglibible.

The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." For Fourteenth Amendment purposes, public education is considered to be a responsibility of the state and "educators are required to treat similarly all classes of persons and to provide adequate due process where liberty and property interest...are denied."[9]

In the context of equal protection decisions a state cannot function without classifying its citizens for various purposes, and treating some differently than others. If a policy or law discriminates "against an individual on the basis of a suspect classification... or affects a fundamental right...such provisions will be strictly scrutinized by the courts and will be justified only if a compelling interest can be proven."[10]

Upon analysis, children with AIDS do not compose a suspect class for strict scrutiny purposes. They do not have a long history of discrimination; they do not have an immutable trait that distinguishes them from others; and no stereotypical characteristics exist.

If the courts were willing to consider education a fundamental right, then the strict scrutiny analysis would apply. Education, however, is not mentioned in the Constitution. Rather, it is a privilege conferred by the states and, as a result, not a fundamental right. Once a state chooses to provide public education, though, the state must grant this right to all students on equal terms. Education has also been ruled under state law to be of "fundamental importance" and to qualify as a "property right." Additionally, both the Burger Court and the Rehnquist Court have been reluctant to increase what comes under the heading of fundamental rights or to expand the number of suspect classes.

Since children with AIDS do not form a suspect class and education is not considered a fundamental right, the standard for strict scrutiny cannot be met. Such exacting strict scrutiny standards have led the Supreme Court to establish an intermediate level of scrutiny. This intermediate level requires that the classification serve important

governmental objectives and the discriminatory acts be substantially related to the achievement of those objectives.

The Supreme Court held that under the equal protection clause that children of illegal aliens could not be denied a public education. Even though the Court did not hold that the children were of a suspect class or that education was a fundamental right, it was determined that education was more than just a benefit indistinguishable from other forms of social legislation.[11]

It would seem that when dealing with children with AIDS at least a quasi-suspect class exists since the children are subject to extreme prejudices and deserve protection as did the children of illegal aliens. This protection should be sufficient for the intermediate scrutiny level.

Another avenue to protect students with AIDS from discrimination is the Rehabilitation Act of 1973, Section 504. This federal statute states:

> No otherwise qualified handicapped individual... shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[12]

A Florida case is the first published case law involving discrimination practices against persons with infectious and/or contagious conditions based on Section 504 of the Rehabilitation Act.[13]

Jean Arline, a third grade classroom teacher in Nassau County, developed tuberculosis at the age of 14. In 1969 she was awarded a continuing contract to teach in Nassau County, but had relapses of tuberculosis in May 1977, March 1978, and November 1978. While she was placed on leave with pay for the remainder of the 1978-79 school year, the board decided to discharge her on the grounds of continued reoccurrence of tuberculosis.

On March 3, 1987, the Supreme Court in a 7-2 split decision held that she was dismissed solely because of her handicap. Justice Brennan wrote:

> Arline's contagiousness and her physical impairment each resulted from the same underlying condition, tuberculosis. It would be unfair to allow an employer to seize upon the distinction between the effects of a disease on others and the effects of a disease on a patient and use that distinction to justify discriminatory treatment.[14]

Brennan went on to say:

> ...Allowing discrimination based on the contagious effects of a physical impairment would be inconsistent with the basic purpose of Section 504, which is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others.[15]

While this decision would seemingly be a victory for those having AIDS, Justice Brennan "carefully avoided rendering a decision on a key issue with respect to AIDS: namely, whether a person who carries the AIDS virus but has not shown any symptoms can be discharged because of contagiousness."[16]

However, the Ninth Circuit Court of Appeals recently ruled that a public school teacher with AIDS could not be involuntarily transferred to a non-teaching position. The court held that barring the teachers from the classroom is a violation of Section 504.[17] The district court had ignored the ruling in Arline and was admonished by the Circuit Court for not following medical evidence regarding AIDS.

The Department of Justice has further confused the issue with a recent Memorandum of Law which says that "an individual's real or perceived ability to transmit disease to others (absent any other physical disability) is not a protected handicap within the meaning of Section 504."[18]

Yet the question remains - how are the schools dealing with students who have AIDS? In a number of cases, the courts are deciding this issue.

In August, 1985, New York Mayor Edward Koch announced that while children with AIDS would not automatically be excluded from the New York Schools there would be a case-by-case review to determine whether the health of the student would permit school attendance. In September, 1985, the president of one of the local boards - District 27 - applied for a temporary restraining order and a permanent injunction prohibiting any student with AIDS from being admitted to schools within New York City. The Supreme Court of Queens County upheld the right of the children with AIDS to attend school. The ruling stated that the automatic exclusion from school of all children with AIDS would violate their rights under the Rehabilitation Act and to equal protection laws.[19]

The court also held that a district should decide, on a case-by-case basis using a multidisciplinary panel, if a child's special condition would warrant an exception to the nonexclusion policy, and that confidentiality within the school system of children with AIDS could be required. The court made it clear that although parental fears are understandable, there is no factual or legal basis for excluding children with AIDS from school.[20]

In California, Ryan Thomas, a kindergarten student with AIDS attended school regularly until he bit another child in the led during an in-class scuffle. While no skin was broken, his aggressive behavior, which a psychologist had documented would probably continue, was grounds for the school board to exclude him from the regular classroom. Ryan was provided with home tutoring. In this case, it was held that the defendants

could not exclude Ryan from attending his kindergarten class on the ground that he posed a risk of transmission of the AIDS virus to others in his class. Ryan's condition was a protected handicap under Section 504, and he was "otherwise qualified" to attend the regular kindergarten. It is important to note that the burden of proof was not with Ryan, but rather the burden to prove that Ryan posed a health threat to the classroom rested with the school board. In addition, the plaintiffs were awarded attorney fees and court costs.[21]

In a New Jersey case the school board requested the withdrawal of a preschooler when it was learned that she had AIDS. A board appointed team, after evaluating the child, recommended a special education placement for the child which the board also rejected. Challenges on the admission guidelines for children with AIDS and the denial of an appropriate education for the preschooler with AIDS were heard by the Supreme Court of New Jersey. The court held that the Commissioner of Education could override the power of the local school boards to exclude students due to health reasons. In other words, the power to exclude students for health reasons was not held solely by the local school board. The student was admitted to a special education class for the neurologically impaired.[22]

One of the more highly publicized cases involved three hemophiliac boys - Richard, Robert and Randy Ray - who had tested positive for the AIDS virus. A Florida school district placed the boys in home-bound instruction and further informed the parents that the boys would not be admitted to the regular school program or the summer school program. The parents sought a preliminary injunction admitting the children to normal and regular integrated classroom settings, subject to guidelines

adopted by the court, unless and until it could be established that the children posed a real and valid threat to the school population.[23]

The court held that the school district was restrained from excluding the Ray boys from an integrated classroom and all related activities and educational services, and from otherwise discriminating against or denying them educational opportunities. The court also added twelve conditions to the return of the boys to the regular classroom. Some of the conditions were: yearly retesting for the AIDS virus, no participation in contact sports, stringently complying to all guidelines established concerning classroom conduct, sharing all health reports with the school district, establishing a special committee to determine the classroom placement of the boys, adhering to an elevated standard of personal hygiene, and avoiding incidents at school which might result in blood spills or the exchange of body fluids.[24]

A great deal of medical evidence was presented during this case about the transmission of AIDS. It is significant to note that based on the medical evidence there was little alternative but to return the boys to the classroom. The medical evidence is summarized as follows:

> Extensive and numerous studies have consistently found no apparent risk of (AIDS) infection by individuals exposed through close, non-sexual contact with AIDS patients. These studies have demonstrated that contacts involving sharing of household items, such as toothbrushes, eating utensils, and baths or toilets, do not lead to (AIDS) infection. Similarly, there is no evidence that close personal, but non-sexual interaction, such as having a bath, shaking hands or kissing on the lips will cause (AIDS) infection.[25]

The Ray boys did return to the classroom - led by police guards - in Arcadia, Florida. The family, however, moved from the area a few days later when their house was destroyed by a fire which the police termed "suspicious." The boys are now peacefully attending the regular public schools in another Arcadia, this one in Illinois.

In another case, the parents of a child with AIDS brought action against the school district claiming discrimination in placing the student on home instruction. The school board moved for dismissal. The plaintiff claimed discrimination in regard to violation of Section 504. The judge, however, could find no evidence that the plaintiff suffered from limited strength, vitality or alertness - or that his educational performance had been adversely affected in any way. In a most unusual and confusing ruling the judge said that no meaningful administrative remedies exist for the plaintiff as the child did not meet the guidelines as set forth in the Education for All Handicapped Children's Act; furthermore, the judge denied the defendants' motion to dismiss.[26]

A recent controversy occurred in Fairfax County Virginia. A kindergarten student with AIDS had not been allowed to attend class since November 10, 1987. The board, in a decision on January 2, 1988, voted to readmit the child after the county health director testified that the child posed no threat to the health of her classmates. The school board had no formal policy for the handling of students with AIDS, but did require that the girl be monitored weekly by medical professionals for any possible change in her condition. The case had escalated recently after a newspaper quoted

Fairfax Superintendent Robert Spillane as saying: "The kid'll be dead in a few months. What's the point of the lawyer?"[27]

Kenneth Labowitz, the lawyer for the Fairfax County family, reported that there were presently six cases filed nationwide on behalf of children with AIDS. In four of the six cases the courts have ordered that the schools must admit the students with AIDS.[28]

Upon review of the court cases involving students with AIDS, and with AIDS presently having no cure or treatment, it seems unduly burdensome to force students with AIDS to court to have their cases finally resolved. The precedent has been set - children with AIDS are being allowed to attend school. The risk of transmission of AIDS in the classroom setting is so slight or nonexistent that exclusion of children with AIDS is not necessary.

Dr. James O. Mason, Director of the Center for Disease Control in Atlanta, related the risk of a child getting AIDS from another child at achool as the same as "being struck by lightning when you walk out the front door in the morning." He went on to say that "for periods of study ranging from a few months to five years, it was shown that not a single person in the children's household had developed the disease, or even antibodies, indicating infection as the result of contact with the child."[29]

What then, are the implications for the local school districts and the administrators who will, ultimately, be faced with a child with AIDs entering school?

In the recent surgeon General's report on AIDS, Dr. C. Everett Koop states that there should be no blanket rules to mandate how local school boards should handle students with AIDS. He says that "each

case should be considered separately and individualized to the child and the setting, as would be done with any child with a special problem."[30]

The national Center for Disease Control has recommended, and the courts have supported, that schools should establish a multi-disciplinary team to study, on a case-by-case basis, the placement of students with AIDS. The Center for Disease Control has suggested the following criteria to help make this placement decision: "(1) a determination that the child is well enough to attend school without undue risk to his/her own health, and (2) a determination that the child's behavior does not pose any increased risk of the transmission of HIV to others in the classroom."[31]

Placement decisions should be made by a team of persons who are knowledgeable about the child, and should be based on medical and educational data. The courts have recommended that the child's physician and public health personnel be included on this team. At least 39 state boards of education have adopted guidelines similar to those recommended by the Center for Disease Control.[32]

While there have been no reported cases of AIDS being transmitted in a school setting, both the U.S. Public Health Service and the American Academy of Pediatrics have advised that "children with AIDS who lack control over bodily functions, have open wounds or cuts, or display behavior such as biting, should receive individualized instruction outside the classroom."[33] Additionally, as the court outlined in the Ray case, the school may place limitations on the activities in which a child with AIDS may participate - such as no contact sports or no activities in which the child's conduct might endanger the other students.

School districts must also take steps to ensure that information about students with AIDS is kept confidential. The Education of the Handicapped Act and the Family Educational Rights and Privacy Act both prohibit the unconsented disclosure of personally identifiable information about students.

The disclosure of children with AIDS within the school system is viewed by the courts, the health officials, and the health agencies as counterproductive and not always necessary. The argument put forth is that the disclosure is likely to produce enormous harm as it is "unrealistic to expect that, in the current atmosphere, teachers (or principals or superintendents) will be able to adhere to the strict confidentiality required. And once the identities of the children with AIDS become more widely known, they are likely to be ostracized."[34]

All school districts, as was mentioned in the District 27 case and the Ray case, must adopt routine procedures for the handling of blood and body fluids. Procedures must also be established for handling bites or bleeding injuries, regardless of whether or not students with AIDS are known to be in attendance.

Secretary of Education Bennett has emphasized that education is the only sure way to prevent the spread of this fatal disease. He goes on to say that the "decisions on how and when to teach children about AIDS should be left to the states, school boards, and local communities."[35] The Federal role will focus on developing and conveying accurate information on AIDS to educators, but it will not be to mandate a specific school curriculum.

As confusion, misinformation, and contradictions intensify about AIDS, it is paramount that districts develop programs that are effective

so that students learn the facts. These programs must be locally determined and must be consistent with parental values. The U.S. Department of Education suggests that the programs must teach about high-risk behaviors, present the facts in a straightforward manner, emphasize standards of right and wrong, promote parental involvement, and use appropriate materials.

School officials cannot afford to wait on this issue. AIDS is a serious problem and it is not going to go away. Every school leader must have a thorough understanding of AIDS in order to make plans, and to develop and implement policies and procedures that can be legally upheld.

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